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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 209

EMICH MOTORS CORPORATION AND U. S. ACCEPTANCE CORPORATION,

Petitioners,

vs.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents.

RESPONDENTS' REPLY TO MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OR MODIFICATION.

HENRY M. HOGAN,
General Motors Building,
Detroit, Michigan,
FERRIS E. HURD,
120 South La Salle Street,
Chicago, Illinois,
HENRY F. HERBERMANN,
1775 Broadway,
New York, N. Y.,
Counsel for Respondents.

October 30, 1950.

THE LAWYERS CO-OPERATIVE PRINTING COMPANY, 210 WEST MADISON, CHICAGO

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The motion for leave to file a petition for rehearing or modification of the order granting certiorari proceeds upon two premises, neither of which involves any matter arising since the presentation of the original petition or any matter not presented in that petition (cf. Rule 33 (2) of this Court). These premises are:

1. That the other questions raised in the petition for certiorari have as much public importance as the construction of Section 5 of the Clayton Act; and

2. That it would be "unthinkable" to retry the case under the rulings of the *trial* court.

The lack of foundation for plaintiffs' position on the other questions presented by their petition for certiorari has been demonstrated in respondents' brief in opposition. It was there shown that there was no price fixing issue in the case (Br. in Opp., p. 18), no negative or uncorroborative evidence was held to be admissible (Br. in Opp., pp. 19-22), the defenses were neither "sham" nor "dishonest" (Br. in Opp., pp. 25-26) and the evidence on damages was speculative and conjectural under tests established by this Court (Br. in Opp., pp. 28-30).

Plaintiffs' further announcement of their momentary feeling that

> "merely to retry the case under the rulings of the trial court * * * is unthinkable" (Petn. for Rehrg., p. 5)

hardly presents a substantial ground for reviewing rulings of a court of appeals which are based upon established principles of law peculiar to jury trials. The charge that defendants prolonged the trial in an effort to win by attrition was a frequent refrain in the trial court as plaintiffs sought to prejudice the jury against defendants. Their purpose became so obvious that they were finally forbidden by the court to make any comment in the presence of the jury on the length of the trial (R. 4988). The trial court further stated (R. 4988):

> "These charges and accusations of attempting to prolong the case are wholly unfounded in my opinion * * *."

The fact is that counsel for plaintiffs and not defendants were responsible for the length of the trial. Approximately

three-fourths of the entire record consists of examination, cross-examination or argument by counsel for plaintiffs. Consequently they are hardly in a position to contend, as they apparently do, that because of the length of time a retrial would necessitate, the multitude of seriously prejudicial errors their conduct induced should be overlooked or condoned and the judgment in the trial court affirmed.

Complaint is also made that the "opinion below leaves the trial court without adequate guidance in many important respects" (Petn. for Rehrg., p. 6). No specification is furnished. The record reference (R. 9479) is to plaintiffs' petition for rehearing before the Court of Appeals wherein they sought to conjure up approximately thirty questions which they claimed arose from ambiguity in the opinion (R. 9480-9491) and where they complained that the court had not expressly passed upon every error assigned by defendants (R. 9492-9493). The supposed ambiguities did not exist (see answer of appellants to petition for rehearing). And although the Court of Appeals had no duty to deal expressly with every error assigned (*Mutual Life Insurance Co.* v. *Hill*, 193 U. S. 551, 553) its opinion evidences thorough and careful consideration of the opposing contentions. The court said (R. 9469):

> "We have given the record, consisting of over nine thousand printed pages, and the exhaustive briefs of counsel much time and serious thought, and from our study of the case have reached the conclusion that the trial judge erred in his rulings on the inclusion and exclusion of evidence and in his instructions to the jury, which affected the substantial rights of the defendants, hence we must reverse the judgments and remand the case with directions to grant a new trial."

It is respectfully submitted that the motion for leave to file a petition for rehearing or modification should be

denied or, if allowed, that the petition itself should be denied.

Respectfully submitted,

HENRY M. HOGAN,
General Motors Building,
Detroit, Michigan,

FERRIS E. HURD,
120 South La Salle Street,
Chicago, Illinois,

HENRY F. HERBERMANN,
1775 Broadway,
New York, N. Y.,
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